

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re

JAMES JOEL HOLMAN and CANDICE
EVANGELINE HOLMAN,

Debtors.

Case No. 14-35381-rld7

DWIGHT and LAURA DANIELS,
husband and wife.

Adversary Proceeding No. 14-03285-rld

Plaintiffs.

JAMES JOEL HOLMAN and CANDICE
EVANGELINE HOLMAN,

Defendants.

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' MOTION TO AMEND
FINDINGS AND MOTION TO EXTEND
STAY**

Creditors/Plaintiffs Dwight Daniels and Laura Daniels (“Daniels”) filed their response to Defendant, James Joel Holman (“Holman”) Motion to Amend Findings as stated as follows:

HOLMANS' CERTIFICATION

In his Motion To Amend Findings, Holman certifies that pursuant to LBR 7007-1(a)(1), his counsel made a good faith effort to confer with counsel for Plaintiff but has not been able to do so. LBR 7007-1(a)(1) mandates that the movant must certify either:

- (A) That the parties made a good faith effort through personal or telephone conferences to resolve the dispute but have been unable to do so;
- (B) The movant made reasonable efforts to confer and the opposing party refused, including the description of the efforts made;
- (C) The movant or opposing parties is a prisoner not represented by an attorney.

In fact, counsel for Holman made no effort to confer either by telephone or personal conference. The only effort made was an email sent to counsel for Plaintiffs at 11:00 a.m. Less than five (5) hours later at 4:11 p.m., Holmans' Motion to Amend Findings was filed and at 4:13 p.m., Holmans' Motion to Stay Enforcement of Judgment was filed. See Exhibit 1 to Declaration of R. Hunter Bitner, II. Holman did not meet the requirements of LBR 7007-1(a)(1).

FACTUAL BACKGROUND

Defendants' motion involves a trial that took place on August 13, 2015 between Dwight and Laura Daniels as Plaintiffs and James Joel and Candice Evangeline Holman as Defendants. The Daniels asserted exceptions to discharge claims against the Holmans under 11 USC §523(a)(2)(A) and 523(a)(2)(B). Prior to trial, Summary Judgment was entered in favor of Mrs. Holman on the Daniels' 523(a)(2)(A) claim. After the trial, judgment was entered on behalf of Plaintiffs excepting Mr. Holman's debt under 523(a)(2)(B) and entering judgment on behalf of Defendant Holman on the Plaintiffs' claim under 523(a)(2)(A) and in favor of Candice Holman under 523(a)(2)(B). That judgment was filed on September 8, 2015. See Exhibit 2 to the Declaration of R. Hunter Bitner, II. Defendant James Holman has now filed a motion to amend the findings, specifically as found on pages 15-16 of the Memorandum Opinion. *See* Holman's Motion to Amend Findings. Those are the only findings Holman's motion addresses. Holman's memorandum addresses, as an aside, findings on page 17 but as the motion does not address it, Holman has not requested any other amendments.

POINTS AND AUTHORITIES

Standard And Burden

It is also unclear what rule Holman is proceeding under as there is no reference to any Rule of Civil Procedure or any other statute or ordinance within Holman's motion or memorandum. However, given the terminology used, it is assumed that Holman is proceeding under FRCP 52(b), which allows a party to move the court to amend its findings or make additional findings.

1 Motions under Rule 52(b) are designed to correct manifest error in findings of fact, which
2 are central to the ultimate decision; however, the rule is not intended to serve as a vehicle for a
3 rehearing. *See, United States v. State of Or.*, 666 F. Supp. 1461, 1466 (D. Or. 1987); *Davis v.*
4 *Mathews*, 450 F. Supp. 308 (E.D. Cal. 1978). Recognized grounds for such a motion include
5 manifest error of fact or law by the trial court, newly discovered evidence, or a change in the
6 law. *See, Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 63 S. Ct. 543, 544 87
7 L.Ed. 714 (1943) *reh'g denied*. 318 U.S. 800, 63 S. Ct. 758, 87 L. Ed. 1163; *Gutierrez v.*
8 *Ashcroft*, 289 F. Supp. 2d 555 (DNJ 2003) *aff'd on other grounds sub nom Gutierrez v.*
9 *Gonzalez*, 125 F. App'x 406 (3d Cir. 2005); *389 Orange St. Partners v. Arnold*, 179 F.3d 656,
10 665 (9th Cir.1999) (setting forth grounds for reconsideration under Civil Rule 59(e)); *see*
11 *also* Rules 7052 and 9023 (applying Civil Rule 52 and 59 to bankruptcy proceedings).

12 A party may not attempt to introduce as “newly discovered evidence” that was available
13 at trial but not introduced or make arguments that were likewise available at trial. *See, In re Jim*
14 *Slemons Hawaii, Inc.*, No. BAP HI-11-1464, 2013 WL 980115, at *15 (B.A.P. 9th Cir. Mar. 13,
15 2013), *aff'd*, 584 F. App'x 671 (9th Cir. 2014); *U.S. v. Local 1804-1, International*
16 *Longshoreman's Assoc.*, 831 F. Supp 167 (S.D.N.Y. 1993). Nor are parties to use the rule to
17 allow parties to present their case under new theories. *See Diebitz v. Arreola*, 834 F. Supp. 298
18 (ED Wisconsin 1993). Additionally, a motion to amend should not be granted where the
19 proposed additional findings of fact are not material to the court's conclusions. *Elkins v. McGee*,
20 1987 WL 181520*1, 1987 US Dist LEXIS 12589*3 (D. Kan. Sept. 9, 1987); *Rank v. Krug*, 155
21 F. Supp. 872 (SD Cal. 1957).

22 **Application**

23 As noted above, a Rule 52(b) motion cannot be used to introduce newly discovered
24 evidence which was available at trial but not introduced or to serve as a broad effort to reshape
25 findings of the court creating findings more favorable to the movant rather than more accurate
26 for purposes of appellate review. Additionally such a motion may not be used to raise arguments

1 which could have been made in advance of the prior court's ruling. *Diocese of Winona v.*
2 *Interstate Fire and Casualty Company*, 89 F.3d 1386 (8th Cir. 1996); *Diebitz v. Arreola, supra*.
3 That is precisely what Holman is attempting to do with his motion.

4 Simply put, Holman is now attempting to change his testimony; testimony that was taken
5 under oath during the adversary proceeding on August 13, 2015. Both Plaintiffs' counsel and the
6 Court asked Mr. Holman about the value of his business and how he came to evaluate it. At best,
7 he testified that he was basing his value off of an evaluation that had been done "a year or two
8 prior." Additionally, as admitted in his own motion, Holman was asked by the Court whether
9 the \$5,000,000 amount listed in the financial statement was the gross value of Defendant's
10 company to which he replied in the affirmative.

11 In fact, the issue was brought up numerous times during trial and Holman either testified
12 consistently or made no objection or clarification.

13 Q: You see under assets, closely held business, do you see
14 that?

15 A: Yes

16 Q: \$5 million, right?

17 A: Yes.

18 Q: What does that number represent?

19 A: That represents what the assets of that business were in
20 terms of worth, I suppose.

21 Q: What business are we talking about?

22 A: For us, in my mind, that would represent our PCS, all
23 the PCS entities.

24 Q: Is that your net value worth, or is that a gross worth?

25 A: That is what I believe would be more of the gross. It's
26 worth the gross.

1 Transcript of proceedings before the Honorable Randall C. Dunn, August 13 2015, page 160 line
2 25- page 161 line 14; *see also* page 167 line 5- page 168 line 3; page 309 lines 11-14; page 313
3 lines 1-4; page 326 lines 15-20. In other words, Holman had a plethora of opportunities to
4 explain his testimony or understanding and failed to do so.

5 Holman now is attempting to “take it back” and explain to the Court that he meant
6 something completely different. This is not what a Rule 52(b) motion is for. In support of his
7 “new story” Holman attaches an appraisal done on his company from seven (7) years ago.
8 Plaintiffs would posit that an appraisal from 2008 is hardly relevant regarding the value of the
9 business years later. Regardless, this is not “newly discovered evidence”. This evidence was
10 more than available to the Holmans at the time of trial and was never entered. As noted above, a
11 Rule 52(b) motion is not a vehicle in which a party can attempt to introduce “newly discovered
12 evidence” which was available at trial but not introduced. See *U.S. v. Local 1804-1, supra*;
13 *Davis v. Mathews, supra*.

14 As explained by the Court in its Memorandum Opinion, the Judge listened carefully to
15 witness testimony and the arguments of counsel and took copious notes. Additionally, the Court
16 reviewed admitted exhibits and the parties’ trial memoranda. The Court took Mr. Holman at his
17 word and made specific findings of fact therefrom. It is too late for Mr. Holman to “take it back”
18 or try to change or explain his testimony. Moreover, the Court made it clear that it found that the
19 circumstances taken into consideration concluded that Mr. Holman apparently had exhausted his
20 possibilities for obtaining more conventional findings and acted recklessly, among other
21 findings. See Memorandum Opinion pages 16-17.

22 Additionally, the court identified other bases to find reckless indifference or fraud on
23 Holman’s’ behalf. For example, the Court found that the mortgage balance against the Holmans’
24 home stated on the financial statement reinforced that point. Specifically, his statement stating
25 that the mortgage balance was \$450,000 when the Trust Deed balance owed at the time actually
26 totaled over \$542,000, was recklessly indifferent to the truth when he had ready access to the

1 current monthly statements as the person responsible for paying the bills and as pointed out by
2 Holman's counsel in the motion at issue, he "periodically" reviewed the bills.

3 *Id.* at page 175 line 4- page 176 line 19.

4 Mr. Heatherman: He also testified that he reviewed some
5 mortgage statements.

6 Mr. Bitner: I am going to absolutely have to object to that.

7 The Court: No, he did not, because the amount that was owed
8 on the two mortgages was approximately \$100,000
9 off so he did not review the statements. His number
was based on his recollection; it was a general
recollection. That was what he testified.

10 *Id.* at page 223 lines 13-22

11
12 Q: At during the time back in 2011, early'11, when you have
13 prepared the PFS, were you receiving mortgage statements?

14 A: Yes

15 Q: On a periodic basis were you reviewing them?

16 A: Yes

17 *Id.* at page 226 lines 11-17

18 Q: I am now asking; did you have any actual knowledge when
19 you wrote down or typed in \$450,000 that is was true?

20 A: Specific to that, no.

21
22 *Id.* at page 252 lines 4-7

23 Moreover, as admitted during trial, Mr. Holman actually utilized those very bills in
24 responding to Plaintiffs' Interrogatories and it is clear that the court took that into consideration:

25 Q: How did you determine that was the balance?

26 A: In terms of our response to interrogatories?

1 Q: Yes sir.

2 A: Answer this interrogatory, we got statements.

3 Q: Mortgage statements?

4 A: Yes

5 *Id.* at page 176 line 20- page 177 line 1; *see also*, page 318 lines 8-18.

6 Holman now points out that he "occasionally reviewed the mortgage statements".
7 Frankly, this does not overcome testimony at trial that Holman completely ignored the mortgage
8 statements at the time he prepared the financial statement. Again, Holman had every opportunity
9 to clarify any of his testimony and did not do so. Therefore, the proposed additional or amended
10 findings of fact are not material to the Court's ultimate conclusions in this matter.
11

12 It is unclear whether Holman is asking for some amendment regarding the findings
13 regarding the mortgage balance. However, for the reasons explained above, there is absolutely
14 no basis for doing so.

15 For the reasons stated above, there is no reason to grant Defendants' Motion to Amend
16 the Findings of page 15 and 16 of the Court's Memorandum as Mr. Holman testified without
17 hesitation concerning the value of his business and cannot now change his testimony and offer
18 new evidence to the Court which existed as of the time of trial. Holman's motion is no more
19 than a thinly veiled attempt to reshape the findings of the Bankruptcy Court creating findings
20 more favorable to himself rather than more accurate for purposes of appellate review. A Rule
21 52(b) motion is not to be used to obtain a rehearing on the merits in order to litigate old questions
22 which is exactly what Holman is attempting to do here. Additionally, this type of motion may
23 not be used to raise arguments which could have been made in advance of the Court's ruling.

24 "In addition, CIC had ample opportunity to make a record of its legal
25 arguments to its liking on the issue, but did not do so until after the
26 fact. There were also no grounds for reconsideration—CIC did not
present newly discovered evidence, demonstrate clear error, or show an
intervening change in controlling law. *See Fontenot v. Mesa Petroleum*
Co., 791 F.2d 1207, 1219 (5th Cir.1986) (a motion to amend

1 under Rule 52(b) is intended "to correct manifest errors of law or fact or,
2 in some limited situations, to present newly discovered evidence."); 389
3 *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir.1999) (setting
forth grounds for reconsideration under Civil Rule 59(e)); *see also* Rules
7052 and 9023 (applying Civil Rule 52 and 59 to bankruptcy
proceedings)."

4 *In re Jim Slemmons Hawaii, Inc.*, *supra*.

5 **HOLMAN'S MOTION TO STAY THE ENFORCEMENT OF THE JUDGMENT**

6 Based on the foregoing, there is no basis for staying the enforcement of the judgment
7 entered on September 8, 2015. Holman has not identified any manifest error of fact or law,
8 newly discovered evidence or a change in the law and therefore there is no basis for the
9 requested stay.

10 **CONCLUSION**

11 Based on the foregoing, Plaintiffs request that Holman's Motion to Amend the Findings
12 to Stay the Enforcement of Judgment be summarily denied.

13
14 DATED: October 6, 2015.

15
16 SLINDE NELSON STANFORD

17
18 By: /s/ R. Hunter Bitner II
19 R. Hunter Bitner, II, OSB No. 011146
hunter@slindenelson.com
20 Darian A. Stanford, OSB No. 994491
darian@slindenelson.com
21 Slinde Nelson Stanford
22 111 SW Fifth Avenue, Suite 1940
23 Portland, OR 97204
24 Phone: (503) 417-7777
Fax: (503) 417-4250
*Of Attorneys for Dwight and Laura
Daniels*

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO AMEND FINDINGS** on the following person(s) on the date indicated below:

Paul B. Heatherman
Law Offices of Paul Heatherman PC
250 NW Franklin Ave, #402
Bend, OR 97701
Of Attorneys for Debtors-Defendants

By the following indicated method(s):

- By **emailing** full, true, and correct copies thereof to say attorney to the email address noted above, which is the last known email address for said attorney, on the date set forth below.
- By notice of electronic filing using the PACER ECF filing system.
- By causing full, true and correct copies thereof to be **mailed** to the attorney(s) at the attorney(s) last-known office address (as) listed above on the date set forth below.

DATED: October 6, 2015.

SLINDE NELSON STANFORD

By: /s/ R. Hunter Bitner II
R. Hunter Bitner, II, OSB No. 011146
Darian A. Stanford, OSB No. 994491
*Of Attorneys for Dwight and Laura
Daniels*

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

In re

JAMES JOEL HOLMAN and CANDICE
EVANGELINE HOLMAN,

Debtors.

Case No. 14-35381-rld7

DWIGHT and LAURA DANIELS,
husband and wife,

Plaintiffs.

v.

JAMES JOEL HOLMAN and CANDICE
EVANGELINE HOLMAN,

Defendants.

Adversary Proceeding No. 14-03285-rld

**DECLARATION OF R. HUNTER BITNER
II IN SUPPORT OF
CREDITORS'/PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION TO AMEND
FINDINGS AND MOTION TO EXTEND
STAY**

I, R. Hunter Bitner II, declare as follows:

1. I am one of the attorneys representing Dwight and Laura Daniels, Plaintiffs, in the above captioned lawsuit.

2. Attached as Exhibit 1 are true and accurate copies of an email from counsel for Holmans, and notifications of the filing of Holmans' Motion to Amend Findings and Motion to Stay Enforcement of Judgment.

3. Attached as Exhibit 2 is a true and accurate copy of the Judgment filed and entered in this matter.

Page 1 – DECLARATION OF R. HUNTER BITNER, II IN
SUPPORT OF CREDITORS'/PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION TO AMEND FINDINGS
AND MOTION TO EXTEND STAY

SLINDE NELSON STANFORD
111 SW 5th Avenue, Suite 1940
Portland, Oregon 97204
p. 503.417.7777; f. 503.417.4250

1 4. Attached as Exhibit 3 are true and accurate copies of the portions of the trial
2 transcript from the trial of August 13, 2015.
3
4

5 I HEREBY DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST
6 OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE
7 AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.
8

9
10 DATED: October 6, 2015.
11
12 SLINDE NELSON STANFORD
13
14 By: /s/ R. Hunter Bitner, II
15 Darian A. Stanford, OSB No. 994491
16 R. Hunter Bitner, II, OSB No. 011146
17 *Of Attorneys for Dwight and Laura*
18 *Daniels*
19
20
21
22
23
24
25
26

Page 2 – DECLARATION OF R. HUNTER BITNER, II IN
SUPPORT OF CREDITORS'/PLAINTIFFS' RESPONSE
TO DEFENDANTS' MOTION TO AMEND FINDINGS
AND MOTION TO EXTEND STAY

SLINDE NELSON STANFORD
111 SW 5th Avenue, Suite 1940
Portland, Oregon 97204
p. 503.417.7777; f. 503.417.4250

Subject: Daniel v Holman

Date: Tuesday, September 22, 2015 at 11:33:34 AM Pacific Daylight Time

From: Law Office of Paul Heatherman PC

To: 'Hunter Bitner', darian@slindenelson.com

Hunter and Darian:

In an attempt to confer, attached please find a motion to amend findings and supporting documentation. I plan to file later this afternoon.

Sincerely,

Paul

Law Office of Paul Heatherman PC

www.bendattorneys.com

Phone: 541-389-1010

Fax: 541-382-6875

CONFIDENTIALITY NOTE: The information contained in this email is confidential and is intended only for the use of the individual(s) named above and is covered by the Electronic Communications Privacy Act, 18 USC §§ 2510-2521. If the reader of this message is not the intended recipient, you are hereby notified that any retention, dissemination, distribution or copying of this communication is strictly prohibited. It is the sender's intent that the attorney-client privilege be preserved. If you have received this communication in error, please immediately notify us via email. Thank you.

Subject: 14-03285-rld ap Motion to Amend

Date: Tuesday, September 22, 2015 at 4:11:36 PM Pacific Daylight Time

From: BKECF_LiveDB@orb.uscourts.gov

To: BNC_orb@orb.uscourts.gov

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U.S. Bankruptcy Court

District of Oregon

Notice of Electronic Filing

The following transaction was received from PAUL B HEATHERMAN entered on 9/22/2015 at 4:11 PM PDT and filed on 9/22/2015

Case Name: Daniels et al v. Holman et al

Case Number: 14-03285-rld

Document Number: 52

Docket Text:

Motion to Amend *Findings* and Supporting Document(s). Filed by Defendant James Joel Holman Re: [48] Opinion (HEATHERMAN, PAUL)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: C:\Data\LINDA2\PAUL\Holman Appeal\holman.motion amend findings.pdf

Electronic document Stamp:

[STAMP bkecfStamp_ID=994365958 [Date=9/22/2015] [FileNumber=15940145-0
] [69deaf23925cf645bb7916569e27e3a21a4c1460e4800fab9afab0818f3fcc4929
aaaeb82ebb870e8d62f32278c88c92f4a6f8d8f098e45d6344c7619df3046]]

14-03285-rld Notice will be electronically mailed via ECF to:

R HUNTER BITNER, III on behalf of Plaintiff Dwight Daniels
hunter@slindenelson.com

R HUNTER BITNER, III on behalf of Plaintiff Laura Daniels
hunter@slindenelson.com

PAUL B HEATHERMAN on behalf of Defendant Candice Evangeline Holman
ljkerr@bendbroadband.com, paul@bendattorneys.com

PAUL B HEATHERMAN on behalf of Defendant James Joel Holman
ljkerr@bendbroadband.com, paul@bendattorneys.com

DARIAN STANFORD on behalf of Plaintiff Dwight Daniels
darian@slindenelson.com, Amanda@slindenelson.com

DARIAN STANFORD on behalf of Plaintiff Laura Daniels
darian@slindenelson.com, Amanda@slindenelson.com

14-03285-rld Notice will not be electronically mailed via ECF to:

Subject: 14-03285-rld ap Motion To Stay

Date: Tuesday, September 22, 2015 at 4:13:17 PM Pacific Daylight Time

From: BKECF_LiveDB@orb.uscourts.gov

To: BNC_orb@orb.uscourts.gov

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U.S. Bankruptcy Court

District of Oregon

Notice of Electronic Filing

The following transaction was received from PAUL B HEATHERMAN entered on 9/22/2015 at 4:13 PM PDT and filed on 9/22/2015

Case Name: Daniels et al v. Holman et al

Case Number: 14-03285-rld

Document Number: 53

Docket Text:

Motion To Stay *Enforcement of Judgment* Filed by Defendant James Joel Holman Re: [49] Judgment (HEATHERMAN, PAUL)

The following document(s) are associated with this transaction:

Document description: Main Document

Original filename: C:\Data\LINDA2\PAUL\Holman Appeal\holman.motion extend stay.pdf

Electronic document Stamp:

[STAMP bkecfStamp_ID=994365958 [Date=9/22/2015] [FileNumber=15940155-0
] [97a386369e1f7be8e88cc3401e3649d433c89534672622f98e721df1a47d58ecf71
82d167eba179c0b507c7bdbbe4c63900142940f7d562914aed2a3ec70bda01]]

14-03285-rld Notice will be electronically mailed via ECF to:

R HUNTER BITNER, III on behalf of Plaintiff Dwight Daniels
hunter@slindenelson.com

R HUNTER BITNER, III on behalf of Plaintiff Laura Daniels
hunter@slindenelson.com

PAUL B HEATHERMAN on behalf of Defendant Candice Evangeline Holman
ljkerr@bendbroadband.com, paul@bendattorneys.com

PAUL B HEATHERMAN on behalf of Defendant James Joel Holman
ljkerr@bendbroadband.com, paul@bendattorneys.com

DARIAN STANFORD on behalf of Plaintiff Dwight Daniels
darian@slindenelson.com, Amanda@slindenelson.com

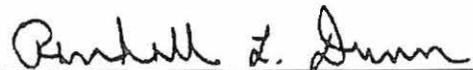
DARIAN STANFORD on behalf of Plaintiff Laura Daniels
darian@slindenelson.com, Amanda@slindenelson.com

14-03285-rld Notice will not be electronically mailed via ECF to:

September 08, 2015

Clerk, U.S. Bankruptcy Court

1 Below is a Judgment of the Court. If the judgment is for
2 money, the applicable judgment interest rate is: "0.36%"
3
4

5 
6

7 RANDALL L. DUNN
8 U.S. Bankruptcy Judge
9

10 UNITED STATES BANKRUPTCY COURT

11 FOR THE DISTRICT OF OREGON

12 In Re: James Joel Holman,) Bankruptcy Case
13 Candice Evangeline Holman,) No. 14-35381-rlld7
14 Debtors.)
15 _____)
16 Dwight Daniels,) Adv. Proc. No. 14-3285-rlld
17 Laura Daniels,)
18 Plaintiffs,) JUDGMENT
19 v.)
20 James Joel Holman,)
21 Candice Evangeline Holman,)
22 Defendants.)
23 _____)

24 Based upon the findings and conclusions set forth in the
25 Memorandum Opinion issued contemporaneously herewith,

26 IT IS ORDERED and ADJUDGED that:

1. Judgment shall be in favor of defendant James Joel Holman
2 on the plaintiffs' claim under 11 U.S.C. § 523(a)(2)(A), and said claim

EXHIBIT 2

1 is dismissed with prejudice.

2 2. Defendant James Joel Holman's debt to plaintiffs is
3 excepted from his discharge under 11 U.S.C. § 523(a)(2)(B).

4 3. Judgment shall be in favor of defendant Candice Evangeline
5 Holman on the plaintiffs' claim under 11 U.S.C. § 523(a)(2)(B), and said
6 claim is dismissed with prejudice.

7 ###

8 cc: R. Hunter Bitner, III
9 Darian Stanford
9 Paul B. Heatherman

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Page 2 - JUDGMENT

EXHIBIT 2

Case 14-03285-rld Doc 49 Filed 09/08/15
Case 14-03285-rld Doc 63 Filed 10/06/15

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In re:)
JAMES JOEL HOLMAN and CANDICE) Case No. 14-35381-rld7
EVANGELINE HOLMAN,)
Debtors.)
DWIGHT and LAURA DANIELS,) Adversary Proceeding
husband and wife,) No. 14-03285-rld
Plaintiffs,)
v.)
JAMES JOEL HOLMAN and CANDICE)
EVANGELINE HOLMAN,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

VOLUME II of II

Before the Honorable Randall C. Dunn

Thursday, August 13, 2015

Hilton Garden Inn

Bend, Oregon

8:49 a.m.

REPORTED BY: Alane R. Harrold, RPR, CSR

HARROLD COURT REPORTING SERVICE (541) 771-8251

EXHIBIT 3

Case 14-03285-rld Doc 63 Filed 10/06/15

1 There is a date of February 1st, 2011, right?

2 A. Where are you looking? Oh, I see it, yes.

3 Q. There you go.

4 Tell me what this financial statement
5 includes. What information is included in it?

6 A. I believe it contains information about
7 assets and -- generally assets, liabilities, income
8 and expenses.

9 Q. Okay. Does that include yours and your
10 businesses?

11 A. No. This is a Personal Financial Statement.

12 Q. But it also includes information about the
13 worth and value of your business as well, doesn't it?

14 THE COURT: Well, you know, there's been a
15 little ambiguity about that. My understanding,
16 subject to being corrected, is that it's not the
17 value of the business, it's the value of the
18 Holman equity ownership in the business.

19 MR. BITNER: Let's clarify that.

20 BY MR. BITNER:

21 Q. Mr. Holman, go to -- you're on page 1, right?

22 A. Yes.

23 Q. I want to say it's on the right-hand side,
24 but let me get there. Left-hand side.

25 You see under assets, closely held business,

1 do you see that?

2 A. Yes.

3 Q. \$5 million, right?

4 A. Yes.

5 Q. What does that number represent?

6 A. That represents what the assets of that
7 business were in terms of worth, I suppose.

8 Q. What business are we talking about?

9 A. For us, in my mind, that would have
10 represented our PCS, all the PCS entities.

11 Q. Is that your net value worth, or is that a
12 gross worth?

13 A. That is what I believe would be more of the
14 gross. It's worth the gross.

15 Q. Go to page 2 real quick.

16 A. (Complies with request.)

17 Q. Up top. Do you see interests in closely-held
18 business?

19 A. Yes.

20 Q. Again, that's the same number, same \$5
21 million number?

22 A. Yes.

23 Q. Does that represent the same thing there as
24 it did on page 1?

25 A. Yes, I believe so.

1 package that we would send to potential investors.
2 He didn't want to see that or the tax returns, so I
3 believe I just sent him this, which is more general
4 in nature.

5 Q. Let's take a look at this. Let's start with
6 the business side you were talking about. You said
7 this is the worth of the PCS business or something, I
8 think is what you said.

9 How did you determine that your businesses
10 were worth \$5 million?

11 A. A couple ways in layman's terms looking at
12 the cash flow and the revenues of the business kind
13 of relative to what they would sell for in our
14 industry, what that market value might be.

15 You know, a little bit more concretely, there
16 is a firm in Portland, a pretty reputable business
17 appraisal firm called Marones Young, and they had
18 done a formal business appraisal. I don't remember
19 when, but it was previous to this. And I believe --
20 I don't recall the specific amount, but, again, seven
21 or eight years, but I believe even a couple years
22 prior or a year prior to it was somewhere in the 4.4
23 million range, 4.2, 4.1. we had grown.

24 We were, even with this new business coming
25 in that was unhealthy, we ourselves were healthy at

1 the time and pretty optimistic that we were going to
2 put them together. And I thought the \$5 million was
3 pretty solid.

4 Q. So that I understand, your business had been
5 evaluated a year or two before?

6 A. At some point previously.

7 Q. Read your deposition testimony. All right.
8 "I believe at the time we had a previous formal
9 business appraisal a year or two prior. I don't
10 remember the exact date."

11 So you utilized that business appraisal and
12 extrapolated out of that forward, correct?

13 A. Yes, that was part of the business basis.

14 Q. Well, I asked you during your deposition what
15 the basis was. That's the only one you gave me.
16 Were there others?

17 A. I think what I just said, that we had kind of
18 grown since that point.

19 Q. You didn't look at any tax returns, right?

20 A. In terms of determining the value of the
21 business?

22 Q. Yes, sir.

23 A. In terms of determining the business, no,
24 value of the business, no.

25 Q. You didn't look at the -- I'm trying to use

1 Q. The monthly payments were more than \$1,980,
2 weren't they?

3 A. Yes.

4 Q. And as you sit here today, you know that the
5 mortgage balance was more than \$450,000 in February
6 of 2011, don't you?

7 A. As I sit here today, yes.

8 THE COURT: Just for my purposes, where is
9 the -- oh, the \$1980 figure is right above the
10 \$450,000. My copy is hard to read.

11 MR. BITNER: That's why I had the big blowup
12 here, but it's hard to use.

13 BY MR. BITNER:

14 Q. So we have a market value of the house of
15 \$775,000 and a mortgage balance of \$450,000.

16 You would agree that would represent you have
17 equity in the home of \$325,000, right?

18 A. Yes.

19 Q. And that's \$25,000 more than the amount of
20 the loan being discussed, correct?

21 A. Yes.

22 Q. How many mortgages did you have on the home
23 at the time? Did you have two?

24 A. Yes.

25 Q. Do you know as you sit here what the balances

1 were on those mortgages as of February 2011?

2 A. Yes.

3 Q. What were they?

4 A. \$540,000.

5 Q. Would you agree with me, sir, you had a
6 mortgage in the amount of \$292,140 with Bank of
7 America and \$250,403 with Cutting Edge Credit Union?

8 A. That sounds very close.

9 Q. If you go to Plaintiff's Exhibit 10, I'll
10 show you where I got those numbers.

11 A. From?

12 Q. From your answers to interrogatories.

13 Do you see that?

14 A. Yes.

15 Q. So you agree with those numbers?

16 A. Yes.

17 Q. So that's total of \$542,543.

18 Would you agree with me?

19 A. Yes.

20 Q. How did you determine that was the balance?

21 A. In terms of our response to interrogatories?

22 Q. Yes, sir.

23 A. When we answered this interrogatory, we got
24 statements.

25 Q. Mortgage statements?

1 A. Yes.

2 Q. As you sit here today, have you done any work
3 to determine what your house was actually worth in
4 February of 2011?

5 A. No.

6 Q. Same question. As you sit here today, do you
7 know that your house was worth \$775,000 as of
8 February 2011?

9 A. It very well could have been worth that.
10 More? I don't know. Depends on the buyer.

11 Q. So moving away from this for a moment, am I
12 correct that you originally offered as security
13 personal property -- well, I'll break this up.

14 Personal property?

15 A. Yes.

16 Q. Business assets?

17 A. UCC.

18 Q. The house, the primary house --

19 A. Yes.

20 Q. -- rights of the primary house?

21 A. Yes.

22 Q. The beach house?

23 A. Let me go back and clarify to the business
24 assets.

25 One conversation -- because the UCC seems to

1 2011?

2 A. I believe that to be fairly accurate.

3 Q. Based on what, based on a listing price
4 across the street from your house, based on --

5 THE COURT: Well, he's testified that it was
6 based on a combination of factors, the listing of
7 the property across the street, the improvements
8 and maintenance work that had been done on the
9 home. And he, of course, discounted his value
10 from what the property was listed across the
11 street. So he has answered that question.

12 MR. BITNER: Fair enough.

13 MR. HEATHERMAN: He also testified that he
14 reviewed some mortgage statements.

15 MR. BITNER: I'm going to absolutely object
16 to that.

17 THE COURT: No, he did not, because the
18 amount that was owed on the two mortgages was
19 approximately \$100,000 off and so he didn't review
20 the statements. His number was based on his
21 recollection; it was a general recollection. That
22 was what he testified.

23 MR. BITNER: I believe what Mr. Heatherman is
24 talking about is he did say he looked at documents
25 in answering interrogatories a couple years later.

1 A. Yes.

2 Q. So, in hindsight, it might have been more
3 accurate to say "I don't know" and not play it safe
4 by saying, "Well, therefore I deny"?

5 A. Yes.

6 Q. You also testified about your general
7 knowledge of the mortgage amounts.

8 Insofar as that, who in your household
9 reviews bills and mortgage statements?

10 A. I do.

11 Q. And during the time back in 2011, early '11,
12 when you had prepared the PFS, were you receiving
13 mortgage statements?

14 A. Yes.

15 Q. And on a periodic basis, were you reviewing
16 them?

17 A. Yes.

18 Q. Now, the second, was that fixed or did it
19 fluctuate, the balance on the second?

20 A. It would fluctuate based on advances or
21 payments made. And often the payments were just made
22 automatically by the company or my controller
23 directly to the credit union, so it was a line and so
24 it would go up and down. I would generally look and
25 see if anything had been paid or if there was

1 down -- did you have any actual knowledge when you
2 put the 450 grand?

3 BY MR. BITNER:

4 Q. I'm now asking: Did you have any actual
5 knowledge when you wrote down or typed in \$450,000
6 that it was true?

7 A. Specific to that, no.

8 Q. Are you telling the Court today, sir, that
9 the Danielses or Mr. Daniels had told you they were
10 going to loan you \$300,000 before they looked at any
11 of your financial information?

12 A. Yes.

13 MR. BITNER: Nothing further.

14 THE COURT: Anything further?

15 MR. HEATHERMAN: Just one question.

16 RECROSS-EXAMINATION

17 BY MR. HEATHERMAN:

18 Q. When we talked about general knowledge and
19 the circumstances surrounding the listing of the
20 mortgage balance information on the PFS, we talked
21 about that.

22 What about the UCC-3, the termination that
23 happened later in the summer of '11? My question is:
24 At the time you made the loan -- excuse me. At the
25 time you received the loan from the Danielses, did

1 need to look deeper into this including the title
2 report. They looked at that. Okay. That told
3 you that you had mortgages back in '03.

4 THE COURT: Well, I disagree with you, but
5 it's a limited disagreement I have with you.

6 If I'm the Danielses looking at this
7 financial statement fresh, from their perspective
8 there's one figure that jumps out at me when they
9 have been assured by a trusted friend as to the
10 character of the Holmans. You've got a net worth
11 here of \$5,948,500. You can afford to be a little
12 bit forgiving with respect to a \$300,000 loan
13 where you're dealing with an excess of \$5,948,500
14 of assets over liabilities. Even without
15 security, if there was really that value -- and
16 it's being represented in a financial statement --
17 that ought to be adequate to support, so the rest
18 is arguably gravy. And, clearly, the residence
19 based on the math reflected 325,000 equity, so
20 beyond the overall strength of the financial
21 statement, which is very strong, it looks gold-
22 plated on the surface. There appears to be enough
23 equity in the home property alone that if it has
24 to be sold, they're going to get paid in full.

25 MR. BITNER: That's how it appeared. I agree

1 readily marketed. And, again, when you've got
2 almost \$6 million asset equity versus liabilities
3 reflected on the statement, that allows for some
4 flexibility unless someone is a total fraud.

5 And we all heard Mr. Holman's testimony today
6 he'd had a testament from a close friend of the
7 Danielses as to his worthiness. There was no
8 basis on the record before them at the time to
9 assume that Mr. Holman was a total fraud, and Mr.
10 Holman would deny that he was.

11 MR. HEATHERMAN: Certainly, Your Honor. And
12 I do to that point believe there was testimony
13 that Mr. Daniels in part or perhaps both
14 plaintiffs at least in part relied upon their
15 pastor friend in making their decision because
16 they got a person that he trusted -- turned out to
17 be maybe a bad referral -- but they entrusted him
18 at the time just as most lay people would entrust
19 their friend or loved one for referral to a third
20 party. And so in part they testified that that
21 pastor or friend -- I don't know if he was a
22 pastor or not -- but Christian friend was in part
23 the basis for their reliance. It wasn't all about
24 this financial statement.

25 THE COURT: All right. In those

1 to deceive, my client testified he had no intent
2 to scam these people, he had no intent to set them
3 up and say I'm going to withdraw this UCC later on
4 or I'm not going to pay the loan back or I know --
5 I actually know that my mortgage is larger, but
6 I'm going to deflate it anyhow, there is no
7 testimony to that on those elements.

8 THE COURT: No. But there is no question the
9 very worst thing for Mr. Holman in the record here
10 is that with information available to him from
11 monthly statements to confirm the balances of the
12 loans secured by the residence property, that he
13 went ahead and pulled out of the air a figure that
14 was approximately \$100,000 too low. I find that
15 very problematic. So that's his biggest problem
16 in my view with regard to the evidence as to the
17 financial statement, and I will be considering
18 that.

19 MR. HEATHERMAN: I would like to --

20 THE COURT: I'm not going to rule orally
21 today. I want to think about it, I want to review
22 the authorities again, and I will look at *Field*
23 *vs. Mans.* But that one really bothers me.

24 MR. HEATHERMAN: If there is no duty to
25 investigate, then I would submit that nobody would

1 MR. BITNER: I was going to make a brilliant
2 point. You just took it right away.

3 MR. HEATHERMAN: I respect the point that she
4 is not an institutional lender, she's not B of A,
5 but the same principles apply, if anything, more
6 so, for someone who doesn't have \$20 billion like
7 Wells Fargo because I would think you would -- a
8 reasonable person is not just going to go off the
9 PFS for \$300,000 in third position. They're going
10 to want to investigate.

11 MR. BITNER: I disagree.

12 THE COURT: But where the financial
13 statement -- I'm going to have to evaluate this,
14 and I'm not prepared to rule today.

15 But where the financial statement says assets
16 over liabilities are in excess almost \$6 million
17 in a sense the security is almost superfluous.
18 But even so, the residence purported to have
19 enough value alone to pay off the debt if were any
20 problems.

21 And, as I said, the most problematic aspect
22 of it is the amount owing on the first and second.
23 The evidence from Mr. Holman as to how he came to
24 his valuation, it's at least plausible. And when
25 we're doing valuations, the testimony of a lay

C E R T I F I C A T E

4 I, ALANE R. HARROLD, Registered Professional
5 Reporter and Certified Shorthand Reporter for the
6 State of Oregon, hereby certify that at the time and
7 place set forth in the caption hereof I reported in
8 Stenotype all testimony adduced and other oral
9 proceedings had in the foregoing matter; that
10 thereafter my notes were reduced to typewriting under
11 my direction, and that the foregoing transcript, pages
12 1 to 329, both inclusive, constitutes a full, true and
13 accurate record of all such testimony adduced and oral
14 proceedings had, and of the whole thereof.

17 WITNESS my hand and CSR seal at Bend, Oregon,
18 this 29th day of September, 2015.

Alane R Harrold
ALANE R. HARROLD
Certified Shorthand Reporter
Certificate No. 98-0354
Expires: 12/31/2017

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **DECLARATION OF R. HUNTER BITNER, II IN SUPPORT OF CREDITORS'/PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO AMEND FINDINGS AND MOTION TO EXTEND STAY** on the following person(s) on the date indicated below:

Paul B. Heatherman
Law Offices of Paul Heatherman PC
250 NW Franklin Ave, #402
Bend, OR 97701
Of Attorneys for Debtors-Defendants

By the following indicated method(s):

- By **emailing** full, true, and correct copies thereof to say attorney to the email address noted above, which is the last known email address for said attorney, on the date set forth below.
- By notice of electronic filing using the PACER ECF filing system.
- By causing full, true and correct copies thereof to be **mailed** to the attorney(s) at the attorney(s) last-known office address (as) listed above on the date set forth below.

DATED: October 6, 2015.

SLINDE NELSON STANFORD

By: /s/ R. Hunter Bitner II
Darian A. Stanford, OSB No. 994491
R. Hunter Bitner II, OSB No. 011146
*Of Attorneys for Dwight and Laura
Daniels*